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## ELECTION COMMISSION, INDIA

NOTIFICATION

*New Delhi, the 19th May 1958*

**S.O. 1014.**—*In continuation of Election Commission's notification* No. 82/310/57 dated the 18th December, 1957, published in the Gazette of India Extraordinary, Part II Section 3 dated the 24th December, 1957, under section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission hereby publishes the Judgment of the High Court of Madhya Pradesh at Jabalpur delivered on the 7th April, 1958, on the appeal filed by Her Highness Maharani Vijaya Raje Scindia, wife of His Highness Maharaja Jiwaji Rao Scindia of Usha Palace, Gwalior, against the order dated 30th November, 1957, of the Election Tribunal, Indore, in Election Petition No. 310 of 1957.

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

FIRST APPEAL No. 129 OF 1957.

Her Highness Maharani Vijaya Raje Scindia w/o His Highness Maharaja Jiwaji Rao Scindia of Usha palace Gwalior.—*Appellant.*

*V*

Motilal s/o Jugal Kishore Ward No. 12 Guna.—*Respondent.*

Appeal by respondent from the order of the Court of the Member, Election Tribunal, Indore presided in by Shri J. K. Narayan dated the 30th November 1957 in Election Petition No. 310 of 1957. Original claim for declaring the election of the respondent—appellant to Lok Sabha from the Guna—Constituency as void. Decreed for Petition allowed and the election of respondent declared void. Claim in appeal for reversal of the lower Court's Order Memo. of appeal presented by Shri R. S. Dabir Counsel for appellant, on 16th December 1957.

The appeal coming on for final hearing on 24th May 1958 and 25th March 1958 before the Honourable the Chief Justice Shri M. Hidayatullah and the Honourable Shri Justice V. R. Sen in the presence of Shri K. A. Chitale with Shri R. S. Dabir Counsel for the appellant, and of Shri N. C. Chatterjee with Shri B. R. Mandleker and Shri Y. S. Dharamadhikari Counsel for the respondent, the following judgement was delivered by the Courts:—

FIRST APPEAL No. 129 OF 1957.

Her Highness Maharani Vijaya Raje Scindia.

*V.*

Motilal.

JUDGMENT

This appeal has been filed by Her Highness the Maharani Vijaya Raje Scindia against an order passed by the Election Tribunal, Indore, in Election Petition No. 310 of 1957 decided on 30 November, 1957, by which her election to the Guna

constituency in the recent parliamentary election has been declared void. The respondent in the appeal was the proposer of one Shri Brij Narain who was also a candidate at the election.

2. The facts of the case are as follows; as many as ten candidates had filed their nomination papers for the said election. Seven of them filed the notices of withdrawal of their candidature before the appointed date and no controversy in respect of their withdrawal exists for determination. Of the remaining candidates one other candidate, by name Shri Brij Narain, sent a notice of withdrawal under section 37 of the Representation of the People Act, (hereinafter the Act) through one Ram Swarup Verma on 3 February, 1957. The notice of withdrawal was accepted by the Returning Officer, who caused a list of candidates who had withdrawn from the contest to be exhibited and also sent notices to the candidates concerned. At the time of the election, therefore, there remained only two contesting candidates the appellant and Shri V. G. Deshpande. The appellant received 1,18,454 votes as against 58,550 votes of Shri V. G. Deshpande, 123 votes being declared forfeited.

3. The election petition out of which the present appeal arises was filed by one Motilal son of Jugal Kishore, a voter and the proposer in one of the nomination forms of Shri Brij Narain. His contention was that Shri Brij Narain had in fact not withdrawn from the contest and that the notice of withdrawal was wrongly accepted by the Returning Officer inasmuch as it was not presented in accordance with the provisions of section 37 of the Act. In the case which was tried by the Tribunal, practically no evidence was led. The only witness examined was the Returning Officer, Shri K. M. Ranade. The Tribunal on these facts came to the conclusion that the notice of withdrawal filed by Shri Brij Narain through Shri Ram Swarup Verma was ineffective in law, and applying the analogy of section 100(1) (c) of the Act declared the election void. In the present appeal the only point for determination is whether the decision of the Tribunal declaring the election to be void for this reason is correct.

4. It may be pointed out at the very outset that though there were allegations that Shri Brij Narain had in fact not withdrawn from the contest no effort was made to establish this. It was pleaded in the petition by Motilal that the letter was meant for Shri V. G. Deshpande, who as Secretary of the Hindu Maha Sabha was to determine whether Shri Brij Narain should stand for the Shivpuri or the Guna constituency, and that the letter instead of being delivered to Shri V. G. Deshpande was wrongly delivered to the Returning Officer. It was also contended that Shri Brij Narain would have preferred to stand for the Guna constituency but for this unauthorised notice of withdrawal filed on his behalf. It may also be pointed out that Shri Brij V. G. Deshpande withdrew his candidature from the Shivpuri constituency, where he had also filed a nomination paper to contest the election.

5. It is contended by Shri Chitale that the challenge to the election of the present appellant is based upon a technical plea that the notice of withdrawal was not filed in accordance with the strict terms of section 37 of the Act. He contends that the 'election agent' mentioned in section 37 is not the 'election agent' described in section 40 who is appointed 'at the election'. He refers to the distinction made in the Act between the phrases 'for election' and 'at an election' used in its various parts. He draws our attention to three rulings in which the matter has been discussed. He relies upon the dictum of Chagla C.J. in *Sitaram* V. *Yograjsingh* (A.I.R. 1953 Bom. 293 at p. 296), which was followed in *Seo Kumar v. V. G. Oak* (A.I.R. 1953 All. 633), He, however, fairly enough also refers to the observations of Sinha J In *Mohammad Umair v. Ram Charan* (A.I.R. 1954 Pat. 225 of at p. 230), where a contrary view was taken and to a decision of their Lordships of the Supreme Court in *Bhikkaji Keshrao* v. *Brijlal Nandlal* (A.I.R. 1955 S.C. 610 at p. 614). The contention of Shri Chitale is that the decision of the Tribunal that the expression 'election agent' in section 37 means an election agents described in section 40 is erroneous. He contends that section 40 was amended in 1956 and required before amendment the appointment of an election agent before nomination. In view of the amendment of the law he contends that it cannot be said that an election agent now must be appointed before the nomination, and that the election agent is an agent appointed for the purposes of the election as the words at the election' in section 40 show. As against this, the learned counsel for the respondents contends that an election agent can even after the amendment be appointed at a stage previous to the scrutiny of the nominations, and that section 36 mentions four kinds of persons who can be present at the scrutiny of the papers. Reference is also made to section 123 and various other sections where the expression 'election agent' occurs.

6. We cannot do better in this context than take as guide the words of their Lordships of the Supreme Court in Bhikaji Keshao *v.* Brijlal Nandlal (A.I.R. 1955 S.C. 610 at p. 614). This is what their Lordships stated:—

> 'It appears to us to be unnecessary and academic to go into this judicial controversy having regard to the decision of this Court in—"Jagan Nath *v.* Jaswant Singh A.I.R. 1954 S.C. 210. If we were called upon to settle this controversy, we would prefer to base the decision not on any meticulous constructions of the phrase "at the election" but on a comprehensive consideration of the relevant provisions of the Act and of the rules framed thereunder and of the purpose, if any, of the requirement under section 82 as to the joinder of parties other than the returned candidate.'

Their Lordships did not decide what meaning should be attributed to the phrase 'at the election'. Taking a comprehensive view of some of the relevant provisions of the Act we think that the result is inescapable that an election agent can be appointed at any time and even previous to the filing of the nominations. We refer to a few sections in this behalf.

7. Section 40 occurs in Chapter II of the Act which is entitled 'Candidates and their Agents' It, therefore, shows that there is provisions in this Chapter for the appointment of all kinds of agents which a candidate may have, apart from agents not appointed under Chapter II. Section 40 reads as follows:

> 'A candidate at an election may appoint in the prescribed manner any one person other than himself to be his election agent and when any such appointment is made, notice of the appointment shall be given in the prescribed manner to the Returning Officer.'

The prescribed manner is to be found in rule 12, which prescribes a form (no. 8). The Returning Officer has to be informed in writing, by filling in the necessary form, that the candidate has appointed so and so as his election agent, from the date of the filling in of the form, at the election to such and such constituency. The candidate is required to sign the form and mention the place and the date. Underneath that there has to be a writing by the election agent, who has to signify his acceptance of the appointment and to mention the place where he has signed the document and the date. When this form is filed under rule 12 the election agent is appointed. Some persons, however, cannot be election agents, because under section 41 there is a disqualification for being an election agent. That section provided as follows:

> 'No person shall be appointed an election agent who is disqualified from being an election agent under section 145.'

Referring to section 145 one finds the following provision:

> 'Any person who is for the time being disqualified under the foregoing provisions of this part for being a member of either House of Parliament or the House or either House of Legislature of a State or for voting at elections, shall, so long as the disqualification subsists, also be disqualified for being an election agent at any election.'

It seems, therefore, that the form which is presented appointing an election agent has to be scrutinized in the same way in which a nomination paper is scrutinized. No person who cannot be a voter or a candidate at an election can be an election agent The appointment of an election agent thus is a very important act, because, according to the scheme of the Act the election agent is required to act for and on behalf of the candidate and binds him with his action, correct or corrupt. In fact, section 100 provides that the election of a candidate can be set aside for the corrupt practice of his election agent. The election agent, as envisaged in section 40, is thus a special person, who acts for the candidate and may in certain circumstances be described as his *alter ego* for the purposes of his election.

8. The question as to whether this election agent should be appointed just before the election proper, that is to say, before the poll commences, or can be appointed earlier, can be resolved with reference to some of the provisions of the Act, Section 36 which deals with the scrutiny of nominations provides as follows:

> (1) On the date fixed for the scrutiny of nominations under section 30, the candidates, *their election agents* one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint....

This shows that apart from the candidate and his proposer the election agent and one other person (who can be described as an ordinary agent) can be present at

the scrutiny of the nomination. This distinguishes at once an 'election agent' from an ordinary agent. This establishes conclusively that the appointment of an election agent can be taken place even prior to the scrutiny of the nominations. We have fortified in this conclusion by reference to another section mentioned earlier. Section 123 reads as follows:

> 'The following shall be demed to be corupt practices for the purposes of this Act.
>
> (1) Bribery, that is to say, any gift, offer or promise by a candidate or his agent or by any other person, of any gratification to any person whomsoever, with the object, directly or indirectly of inducing.—
>
> * * * *

The word 'agent' is defined for the purposes of this section in an explanation appended to the section. It reads as follows:

> (1) in this section the expression "Agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.'

This shows that the word 'agent' as used in the section includes an election agent and also an ordinary agent. Referring to section 100 of the Act, we find the following provisions:

> '(1) Subject to the provisions of sub-section (2) if the Tribunal is of opinion,—
>
> (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent:
>
> * * * *
>
> the Tribunal shall declare the election of the returned candidate to be void.'

A corrupt practice can be taken note of from the moment the candidate has expressed his intention to stand for election. If the corrupt practice of an election agent can be a matter under section 100 then it postulates that the election agent can be appointed earlier and his conduct even prior to the poll if corrupt, can be taken into consideration. Again, in section 123(1) (a) the words are:

> 'a person to stand or not to stand as or to withdraw from being a candidate or to ratire from contest, *at an election*'

This also shows that an election agent can be guilty of the corrupt practice of inducing directly or indirectly a person to stand or not to stand or to withdraw from being a candidate or to retire from a contest. and some of these take place prior to the election proper. Yet, the words used are 'at an election'. All these provisions of law, therefore, clearly demonstrate that the phrase 'at an election' does not mean, as has been narrowly described in the Bombay case. 'the stage of the poll'. It covers all the processes from the point when the candidate first expresses his intention to stand for the seat and continues till the counting of the votes and the declaration of the result. In these circumstances it is difficult to hold that for the purposes of section 40 an election agent can be appointed for the poll. In fact, an election agent, as is clear from section 36 and these other sections, may be appointed even earlier.

9. This being the case, we cannot but say that the term 'election agent' must be regarded as a term of art. Indeed, there are several kinds of agents described in the Act. There are election agents, polling agents, counting agents, and other agents. Reference was made in this connection to section 55A, which has been recently introduced in 1956, where the word 'agent' is used, and it was stated on behalf of the appelant that the expression 'election agent' in section 37 means no more than an agent who has been authorized in writing. We do not think that we can draw any assistance from section 55A, because section 55A was introduced later by an amendment and it is a well-known rule of construction of statues that a uniform meaning cannot be given to different terms, because words may be differently used *at different stages in the enacting* of a consolidated but frequently amended law. It is common place that a statue passes through the hands of different draftsman and one draftsman may not used the indentical language used by another. It may also be that at the stage of retirement even an ordinary agent who who is authorised in writing can file the notice, whereas in the case of the withdrawal of the candidature between scrutiny and the exhibiting of the list of candidates the notice must be filed by his election agent or his proposer, duly authorized in writing if the candidate does not find time to go and file the notice himself. It is for this purpose that section 37 of the Act designates the persons who can file

the notice of withdrawal of candidature before the Returning Officer. It would appear from this, therefore, that the term 'election agent' is used in a specialised sense to distinguish the person appointed under section 40 of the Act from an ordinary agent. We do not and cannot draw any inference from the enactment of section 55A which was introduced later, and which, for intentions best known to the legislature, might not have insisted upon the notice of retirement to be filed by the election agent.

10. From an examination of the law on the subject it is manifest, therefore, that the notice of withdrawal filed by Shri Brij Narain was not in strict compliance with the terms of section 37 of the Act. We have now to see what is the effect of such a notice and its acceptance by the Returning Officer. The contending parties presented before us arguments on the question whether the provisions of section 37 of the Act can be regarded as mandatory or merely directory. The learned counsel for the respondent contends, on the authority of *Nazir Ahmad* v. *King Emperor* (A.I.R. 1936 P.C. 253(2)), *Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (8 A.C. 517), *Julius* v. *Bishop of Oxford* (5 Appeal Cases 214) *and Hari Vishnu* vs. *Ahmad Ishaque* (A.I.R. 1955 S.C. 233 at p. 245), that the provisions must be regarded as mandatory. The learned Counsel for the appellant contends on the other side that the provisions must be regarded as merely directory. The section reads as follows:—

> '(1) Any candidate may withdraw his candidature by a notice in writing which shall contain such particulars as may be prescribed and shall be subscribed by him and delivered before three O'clock in the afternoon on the day fixed under clause (c) of section 30 to the Returning Officer either by such candidate in person or by his proposer, or election agent who has been authorised in this behalf in writing by such candidate
>
> (2) No person who has given a notice of withdrawal of his candidature under sub-section (1) shall be allowed to cancel the notice.
>
> (3) The Returning Officer shall, on receiving a notice of withdrawal under sub-section (1) as soon as may thereafter, cause a notice of withdrawal to be affixed in some conspicuous place in his office.'

The word used is 'shall' which occurs in the body of the section twice. On the first occasion, it enjoins that the notice shall contain such particulars as may be prescribed. These particulars are prescribed by Rule 9 of the Representation of the People (Conduct of Elections and Election petitions) Rules, 1956, and the form prescribed is form No. 5, the Form requires the Returning Officer to endorse on it the following fact:

> 'The notice of withdrawal of candidature by a candidate at the election to the ..... was delivered to me by the ..... ..... at my office at ..... (hour) on ..... ..(date).

There is a dagger to indicate how the third blank is to be filled, and in the footnote it is put down as follows:

> '(1) Candidate, (2) Candidates proposer who has been authorised in writing by the candidate to deliver it, (3) candidate's election agent who has been authorised in writing by the candidate to deliver it.'

11. The requirements of the form are also insisted upon in the rule because it says that on receipt of such notice, the Returning Officer shall note thereon the date on which and the hour at which it was delivered and the notice shall contain the particulars set out therein. There is no doubt here that the notice of withdrawal was not presented by one of the three persons specified by section 37 or the form, inasmuch as Shri Ram Swarup Verma has not been proved in the case to have been appointed an election agent for Shri Brij Narain. In accepting the notice of the Returning Officer endorsed on it as follows:—

> 'This notice was delivered to me at my office at 2-30 P.M. (Hour) on 3rd February 1957 (date) by Shri Ram Sarup Verma the candidate's agent.'

Shri Ram Swarup Verma also endorsed on this notice the fact that it had been so received. Along with the notice a letter was sent by Shri Brij Narain addressed to the collector-*cum*-Returning Officer, district Guna. It reads as follows:—

सेवा में निवेदन है कि मैंने गुना भेलसा संसदीय निर्देशन पत्र प्रस्तुत किया था उसे वापिस ले लिया है । अतः यह रुपया पांच सौ निर्देशन पत्र की फीस का श्री राम स्वरूप वर्मा को देने की कृपा करें । विथड्रावल का फार्म भी भेज रहा हूं । दिनांक ३-२-५७ ।

विनीत

(सही) ब्रजनारायण बजेरा

It is not denied before us that on the strength of this letter, the secrutiny amount was withdrawn.

12. The learned counsel for the appellant contends that the presentation of the notice of withdrawal complied with the terms of section 37 quoted above, and that the section itself is directory and only requires substantial compliance. The learned counsel for the respondent contends that the section is mandatory and the compliance is defective inasmuch as (a) Shri Ram Swarup Verma was not an 'election agent' and (b) there was no authority in writing to Shri Ram Swarup Verma.

13. Taking the last argument of the learned counsel for the respondent first, we are quite clear that Shri Ram Swarup Verma was authorised in writing. The words विथड्रावल का फार्म भी भेज रहा हूं । coupled with the mention of the name of Shri Ram Swarup Verma, to whom the deposit money was to be paid clearly indicated an authority in writing to Shri Ram Swarup Verma, thus. the only question which falls for our consideration is whether Shri Ram Swarup Verma could present the notice of withdrawal and whether the fact that he was not appointed as an election agent makes any difference in view of the requirements of section 37.

14. The rules as to when an enactment is mandatory and when directory have been laid down in a large number of cases. In so far as the present section is concerned, it starts with using mandatory language. We have pointed out that the word 'shall' occurs in two places first when it requires certain particulars to be given in the notice of withdrawal and second when it requires that the notice shall be presented by one of three specified persons. The learned counsel for the appellant contends that this was a provision conceived in the best interests of the candidate and, therefore, if we reach the conclusion that the notice of withdrawal was in fact signed by Shri Brij Narain, then the requirements of the section must be substantially complied with. The learned Council for the respondent contends that there can be no substantial compliance with provisions like this which is conceived in the interests, not only of the candidate, but also of his proposer and seconder, and the electorate. He therefore, contends that the condition which is made compulsory by this section cannot we waived or altered.

15. In connextion with statutes which use mandatory language there are certain rules which have to be borne in mind. The cases which were cited before us deal with the reading of the word 'may' or analogous word as mandatory. The only case which bears upon this point was the Privy Council decision reported in *Nazir Ahmad* v *King Emperor* [A.I.R 1936 P.C. 253 (2)]. In that case their Lordships of the Privy Council were dealing with a confession which was recorded in breach of section 164 of the Code of Criminal Procedure. Their Lordships observed that where a law lays down a duty to be performed in a particular manner, the duty has to be performed in that way and in no other, and that all other methods of compliance are necessarily prohibited The learned Tribunal has referred to that case. On the other side, of course, there is a catena of cases in which the word 'shall' has been interpreted as merely directory. An example of this is to be found in Buriore and Bhawani Parshad v. Mussumat Bhagana (11 I A. 7). where the word 'shall' was interpreted as merely directory Sometimes, the Courts say that even though an enactment may be couched in mandatory language it can be treated as merely directory if it is meant for the benefit of the person who does not utilize that benefit. The reason of the rule is that the benefit of the section may be waived by the person for whose benefit it is enacted. This is based upon the maxim of law *'cuilibet licet renuntiare juri pro se introducto'* (any person can waive the benefit of a provision of law made for his benefit). This section if it was made for the benefit of the candidate and none else could be waived by him if no harm resulted to any other person and if he stood by the action of his agent. In this sense the section can be regarded as directory. On the other hand, of course, there is the argument that if one has to consider the matter from the angle of the electorate and the election as a whole, it is absolutely necessary that the provisions of this section should be faithfully complied with. Other candidates should not be left in doubt as to whether a particular person has retired or not. and to clear that matter the law has cast the provisions of section 37 into a mandatory form In our opinion, this part of the case does not need solution at our hands because even accepting that the section is mandatory we have to see what results follow It is only if the section be considered as mandatory that the election of the appellant can be declared void under section 100 of the Act, because if directory, there is patently a substantial compliance with it.

16. Here we come to another branch of the argument as to whether a breach of section 37 by the candidate whose notice of withdrawal was irregularly filed, or by the Returning Officer who accepted such irregular notice, can result in a declaration of the election as a whole void. Counsel on both sides referred to the words of section 100 of the Act which may again be quoted here, omitting portions not relevant:

'Ground for the declaring election to be void.—
(1) Subject to the provisions of sub-section (2), if the Tribunal is of opinion—

(a)

(b)

(c) that any nomination has been improperly rejected ; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affect—

(i) by the improper acceptance of any nomination, or

(ii)

(iii)

(iv) By any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the Tribunal shall declare the election of the returned candidate to be void.'

The learned counsel for the appellant contends that the matter has to be judged under clause (iv) of sub-section (1)(d). The learned counsel on behalf of the respondent contends that the matter is analogous to the provisions of clause (c) quoted above. Both sides refer to a decision of their lordships of the Supreme Court reported in *Surendra Nath* v. *Dalip Singh* (A.I.R. 1957 S.C. 242). That case dealt with the improper rejection of a nomination paper. Previously, the section combined clauses (1)(c) and (1)(d)(i) as they exist today, and both these clauses were put on a par and required proff that the result of the election was materially affected by the improper reception or rejection of the nomination paper.

17. Their Lordships distinguished the two aspects of the matter and observed as follows:

'It appears that though the words of the section are in general terms with equal application to the case of improper acceptance, also of improper rejection of a nomination paper, case law has made a distinction between the two classes of cases. So far as the latter class of case is concerned, it may be pointed out that almost all the election Tribunals in the country have constently taken the view that there is a presumption in case of improper rejection of a nomination paper that it has materially affected the result of the election. Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a 'substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidate from the point of view of the electors and the most formidably candidate from the point of view of other candidates may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available. On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the filed. The conjecture therefore is permissible that the legislature realizing the difference between the two classes of cases has given legislative sanction to the view by amending section 100 by the Representation of the People (Second Amendment) Act, 27 of 1956, and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void. For the reasons aforesaid, in our opinion, the majority decision on the fourth issue is also correct.'

18. The learned counsel for the respondent contends that by accepting a notice of withdrawal in breach of section 37 a candidate *is kept out* and therefore the result can never be forecast as to what would have happened if he had been in the filled. The learned counsel for the appellant contends that the acceptance of a notice of withdrawal, sent irregularly, cannot be equated *to the keeing out* of a candidate improperly. According to him, Shri Brij Narain himself wanted to stay out, that he never made any protest and that he went through the election for the Shivpuri constituency, from which Shri V. G. Deshpande withdrew his candidature. According to him, the only flaw was in not appointing any election agent and sending the notice of withdrawal through such an agent. He points out that the petitioner's case before the Tribunal was that the letter which was written to the Returning Officer was not meant to be delivered to the Returning Officer but was to be handed in at the office of the Hindu Maha Sabha where there had to be a party decision as to which the of these two candidates should contest and from which constituency, but this, though alleged, was not proved, though defective in form, cannot be equated *to the keeping out* of a candidate, because it was the desire and volition of the candidate that he should not contest the election and there was just an irregularity in submitting his notice of withdrawal.

19. There is no provision in the section about an improper acceptance of a notice of withdrawal. There is nothing to show that such an acceptance of a notice of withdrawal is to be visited, as a matter of law, with the penalty of a declaration that the election of the returned candidate is void. The Tribunal has invoked the analogy of section 100(1) (c) as now enacted and has stated that the case was analogous to the improper rejection of a nomination paper and therefore the election could be declared to be void as a matter of law.

20. In our opinion, this is not permissible because to do so would be to enact another clause in the first part of section 100 which it is not open to any tribunal to do. Reading the scheme of a section 100 of the Act, which we have quoted above, it is quite manifest that the fourth clause of sub-section (1) (d) of that section is in the nature of a residuary clause dealing with breaches of the Constitution, the Act, the rules and orders made thereunder. The breaches can be so many and of such varied forms that it was impossible to cover every aspect of the case by enumeration in a section like section 100. Therefore, certain categories were mentioned. Some categories lead to the result in law of the avoidance of the election of a returned candidate, and some categories lead, not to an immediate avoidance of the result of the election, but to an examination of the question whether the result had been materially affected. The finding determines whether the election should be avoided or not. In other words, the section is cast in two distinct ways. Certain breaches lead to the avoidance of the election without any proof about the result or the effect of the breachupon it. Certain other breaches of the law can only be penalized if the result of the election has been materially affected. In our opinion the present case does not come within the first three clauses of the first sub-section of section 100, and it cannot be said as a matter of law that the election was void. In *Jagan Nath V. Jaswant Singh* and others (A.I.R 1954 S C. 210 at p 212) their Lordships laid down as follows:

> 'The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interferred with and any petition seeking such interference must strictly conform to the requirements of the law. None of these proposition however has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it.'

21. From this observation of their Lordships of the Supreme Court we derive assistance in reaching a solution of this problem. We have to confine our attention to the enactment under which the election of a returned candidate can be set aside or declared void. That section is section 100. There is no suggestion before us of any corrupt practice. Indeed, there is *no other ground* on which the election of the present appellant was challenged before us. All that has been claimed is that the election is void because there was an improper acceptance of

a notice of withdrawal filed in breach of the law before the Returning Officer. There is nothing to show that the notice of the withdrawal did not emanate from the candidate nor that he did not stand by it till the time of the electioner even thereafter. None of the material witnesses, namely Shri Brij Narain, Shri Ram Swarup Verma or Shri V. G. Deshpande, has been examined in this case. Therefore, it can be assumed that these persons are not interested in the result of the election petition and the only person who has a grievance is the proposer Motialal, who is present before us as respondent.

22. Now the observations of their Lordships clearly show that the election law being a special law, we must not go outside it nor create new law there where there is no such law. The Tribunal did state the proposition in an earlier portion of its order but overlooked it when it came to apply the analogy of clause (c) of sub-section (1) of section 100. As we have stated, in doing so it merely added a clause to section 100 which it was not authorised to do. The matter could only be judged by the Tribunal under the fourth clause of section 100(1)(d) which it has not done.

23. That there has been a breach of the Act is manifest in this case. We have held that the notice of withdrawal could be presented only by the candidate or by his proposer or election agent duly authorized in writing to do so. We have also shown that there was authority in writing, but the person who presented the notice of withdrawal was not a duly constituted 'election agent'. This is the only breach and the only flaw in the acceptance of the notice of withdrawal which has been considered by the Tribunal in such a case, we are quite clear that the matter falls to be governed by the fourth clause of section 100(1) (d) where for a breach of the Constitution or of the Act, or any rules of or orders made thereunder the election can be declared void subject to the condition that the result of the election is materially affected.

24. We cannot lose sight of the words of the statute. The statute says that the result of the election must be 'materially affected' by the non-compliance. We have therefore, to see what is the substance of the matter, apart from the technicality of the law. There may be a breach of section 37, but for all intents and purposes Shri Brij Narain wanted to withdraw his candidature. We do not go by the fact of his having sent an unauthorised person. We go by the fact that he caused the security deposit to be taken away by the same person. We go by the fact that he authorised him in writing to present the notice of withdrawal we also go by the fact that he did not raise any protest and that till today he has not cared to come forward to impeach the action of Shri Ram Swarup Verma, even though an allegation to that effect was made by Motilal in his petition. If Shri Brij Narain did not evince an intention of continuing with the election and has lain by or, in other words, has acquiesced in the unauthorised agent', we do not think that the matter can be said to fall to be decided on the analogy of the improper rejection of a nomination paper. In the present case the contest centred round two persons only, namely the appellant and the defeated candidate Shri V. G. Deshpande. Neither Shri Brij Narain nor Shri Deshpande has cared to establish that the action of Shri Ram Swarup Verma had not their authority. All that can be said is that the action of Shri Brij Narain was irregular. If Ram Swarup Verma had been appointed as an election agent and had presented the notice of withdrawal, then everything would have been alright, but even if there was a breach of the law, we think that the result of the election between V. G. Deshpande and the appellant has not been 'materially affected', because Shri Brij Narain by all tokens never intended contesting the election and has stood by his notice of withdrawal till today.

25. In the Supreme Court case on which reliance was placed the candidate was improperly *kept out*. He can only be described as having stood out. He stood out by choice. He sent his notice of withdrawal. He authorized the person to carry it, and he further authorised the person to withdraw his security amount without which no candidate can stand for an election and, therefore, he nullified his nomination effectively. Even apart from the notice of withdrawal, the fact of withdrawing the security disabled him from contesting the election. In these circumstances it is difficult to say, as was done by the learned Tribunal, that the election can be declared void as a matter of law by correlating this acceptance of an irregular notice of withdrawal with clause (c) of section 100(1) of the Act. We have given anxious consideration to the facts of the case such as they are and the evidence of the solitary witness who has been examined, and we think that the conclusion is inescapable that regard being had to the conduct of Shri Brij Narain

and Shri V. G. Deshpande, the result of the election was not materially affected in this case. The election went through as projected by Shri Brij Narain and Shri V. G. Deshpande and therefore, there can be no grievance on the part of anybody because the contesting candidate had chosen to withdraw from the field. It must be remembered that incertain circumstances a provision like this may even be regarded as directory as was laid down by their Lordships of the Privy Council in *Montreal Street Railway Co. V. Normandin* (A.I.R. 1917 P.C. 142) We quote from the head note which accurately represents the gist of the decision:

> 'When the provisions of a statute relate to the performance of a public duty and the case is such, that to hold null and void, acts done in neglect of this duty would work serious general inconvenience or injustice to persons, who have no control over those entrusted with the duty and at the same time, would not promote the main object of the Legislature, such provisions are to be held to be directory only, the neglect of them though punishable not affecting the validity of the acts done.'

In our opinion, though we do not decide that section 37 can be regarded as directory, these observations of their Lordships are pertinent in deciding for the purpose of section 100 whether the result of the election has been materially affected or not. The breach was no doubt there but means were at hand to correct it, if there was any mistake. No action of any kind was taken and no protest was lodged, either before or after the election, till today. In these circumstances we think that the Tribunal was in error in deciding that the election was void as a matter of law.

26. In our opinion, the appeal is entitled to succeed. The order of the Tribunal is set aside and the election petition is ordered to be dismissed with costs both here and before the Tribunal, Counsel's fee Rs. 300/-

Sd/ M. HIDAYATULLAH, Chief Justice, 7-4-1958

Sd/ V.R. SEN, Judge, 7-4-1958

SCHEDULE OF COSTS

| Particulars | Appellant. Applicant. | Respondent. Non-applicant. |
|---|---|---|
| Court fee on memo of appeal and applications | 22/10/- | .. |
| Court fee on power of attorney | 3/8/- | 3/8/- |
| Court Fee on exhibits | 19/4/- | .. |
| Court Fee on processes | 2/12/- | .. |
| Counsel's fee on Rs. Allowed | 300/-/- | *C.not filed |
| Fee for preparation of paper book | .. | .. |
| TOTAL | 348/2/- | 3/8/- |

[No. 82/310/57/11082.]

DIN DAYAL, Under Secy.

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